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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-

THE AMERICAN OIL COMPANY, ET AL., *Petitioners,*

v.

CITY OF PHILADELPHIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit entered March 16, 1972. That judgment dismissed the petitioners' appeal from an order of the United States District Court for the District of New Jersey. The district court order directed disclosure of grand-jury testimony, with no showing of particularized need, to persons not even parties to the proceeding.

OPINION BELOW

The opinion of the court of appeals is unreported. A copy is appended as Appendix A hereto. The order of the District Court is unreported. A copy is appended as Appendix B hereto.

JURISDICTION

The judgment of the court of appeals was entered March 16, 1972. A timely petition for rehearing with suggestion for rehearing en banc was filed March 31, 1972. An order denying the petition for rehearing was entered April 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the court of appeals err in letting stand an order of the district court requiring wholesale disclosure of secret grand-jury testimony to *"amici curiae"* not even parties to the proceeding, with no showing of particularized need as required by past decisions of this Court?

2. Did the Court of Appeals err in dismissing the appeal solely on the ground that the petitioners—parties defendant in the district court—lacked standing before that court to object to an order compelling the disclosure of their grand-jury testimony to persons not even parties to the proceeding?

RULES INVOLVED

Rule 6(e) of the Federal Rules of Criminal Procedure provides in pertinent part:

> "(e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of

any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule."

Rule 16(a)(3) of the Federal Rules of Criminal Procedure provides:

"(a) *Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . recorded testimony of the defendant before a grand jury."

STATEMENT

The court below has refused to pass upon a district court's order requiring wholesale disclosure of secret grand-jury minutes to private litigants not even parties to the proceeding. The appellate court has failed to review the order before it on the ground that the petitioners somehow lack "standing" to contest that disclosure before the trial court, even though they are parties to the proceeding and, in effect, the persons whose secret testimony is to be divulged. The unprecedented actions of the district court and the court of appeals ignore this Court's recent holdings on the scope of standing in the federal courts, and breach the

principle of secrecy that this Court has traditionally maintained for grand-jury proceedings.

This petition arises from a civil action for injunctive relief brought by the United States under the antitrust laws against the petitioners.[1] The complaint was filed in October 1965 in the United States District Court for the District of New Jersey. On the same day and in the same district, an indictment issued in a companion criminal case. In the course of the criminal action, the district court granted each defendant access to certain of the grand-jury testimony of its officers and employees. *United States* v. *American Oil Co.*, 286 F.Supp. 742, 751-53 (D.N.J. 1968). Under the district court's order, the transcripts of 34 witnesses were made available to the defendants; none of the transcripts was reproduced, and the defendants obtained no copies.

In granting limited access to the grand-jury transcripts, the district court relied upon Rule 16(a)(3) of the Federal Rules of Criminal Procedure, which permits a defendant to inspect his grand-jury testimony.[2] The court held that the testimony of each witness to be disclosed was effectively that of his corporate employer by virtue of their "close proximity of relationship" and because the Government would seek to

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[1] The petitioners are the American Oil Company, Atlantic Richfield Company, Cities Service Oil Company, Cities Service Company, Gulf Oil Corporation, Humble Oil & Refining Company, Sinclair Refining Company, and Socony Mobil Oil Campany.

[2] Rule 16(a)(3) provides pertinently:

> "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . recorded testimony of the defendant before a grand jury."

prove its case from the activities of the testifying witnesses. 286 F.Supp. at 753. The criminal action terminated in December 1969, after the defendants pleaded *nolo contendere.*

While the Government's civil and criminal actions were pending, various entities commenced private treble-damage actions against the petitioners. Although some of those actions date from 1967, none of the private plaintiffs has bothered to take any depositions—whether of persons whose grand-jury testimony was once made available to a defendant, of other witnesses before the grand jury, or of any other persons.[3]

In August 1971, the Government and the petitioners gave notice of a proposed settlement and consent judgment in the Government's injunction suit. The plaintiffs in the private suits thereupon moved to intervene. Among other things, they sought unfettered access to all the grand-jury testimony amassed in the Government's criminal case. Both the Government and the petitioners opposed the private plaintiffs' applications. Both relied upon the traditional secrecy of grand-jury proceedings, as established by past decisions of this Court and embodied in Rule 6(e) of the Federal Rules of Criminal Procedure.[4] Both agreed that the proper

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[3] The private actions, all pending in the New Jersey federal court, are *City of Philadelphia* v. *The American Oil Co.*, Civ. No. 647-68; *State of New Jersey* v. *The American Oil Co.*, Civ. No. 90-69; *McCloskey & Co.* v. *The American Oil Co.*, Civ. No. 47-70; and *Yellow Cab Company* v. *The American Oil Co.*, Civ. No. 98-70. In addition to the petitioners here, the following corporations are named as defendants in those actions: Chevron Oil Co., Getty Oil Co., Sun Oil Co., and Texaco, Inc.

[4] Rule 6(e) provides pertinently:

"Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be

procedure—developed in the course of the electrical antitrust cases—was for the private plaintiffs to seek discovery from the petitioners in the various private actions through the conventional means provided by the Federal Rules of Civil Procedure, and, in the event those proved unsatisfactory, to apply to the trial court for access to the grand-jury minutes upon a showing of particularized need.

The district court approved the final consent judgment disposing of the Government's suit. And it denied intervention to the private plaintiffs. But it accorded those plaintiffs the status of *"amici curiae."* And it then granted the *"amici"* wholesale disclosure of *all* the grand-jury testimony that the Government had previously made available in the criminal case to *any* of the defendants (App. B, ¶ 3). It apparently so acted on the theory that the mere passage of time since the grand-jury testimony, together with the defendants' prior access to that testimony, somehow established "particularized need" for disclosure to the private plaintiffs.

The petitioners took an expedited appeal to the Court of Appeals for the Third Circuit. That court dismissed the appeal on the ground that the petitioners had lacked standing in the district court to oppose the

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made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

discovery requests of the *"amici."* In so ruling, the appellate court left standing the order of the district court providing for wholesale disclosure of grand-jury testimony to persons who were not even parties to the proceeding, and who had made no showing of particularized need.[5]

REASONS FOR GRANTING THE WRIT

I. THE WHOLESALE DISCLOSURE OF GRAND-JURY TESTIMONY, WITH NO SHOWING OF PARTICULARIZED NEED, VIOLATES PAST DECISIONS OF THIS AND OTHER FEDERAL COURTS

Until the decision below, no court has ever permitted a private plaintiff to pierce the veil of secrecy surrounding grand-jury proceedings merely as a substitute for discovery in his private litigation. In the limited circumstances where courts have permitted the disclosure of grand-jury testimony to third parties, they have done so only on a witness-by-witness basis, and only when the third parties have begun to take civil depositions. The established practice is that inspection of grand-jury testimony of a witness is permitted only upon a showing that the deposition testimony of that witness reveals significant lapses of memory or material discrepancies between the grand-jury and deposition testimony. *E.g., City of Philadelphia* v. *Westinghouse Elec. Corp.,* 210 F. Supp. 486 (E.D. Pa. 1962), *appeal dismissed,* No. 14296 (3d Cir. 1963) (unreported); *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.,* 275 F. Supp. 146 (E.D. Pa. 1967). Since no depositions whatever have commenced here, the private plaintiffs cannot show—and the courts below could not have properly found—*any*

[5] An order of the district court stays disclosure pending final disposition of the present petition.

need for grand-jury disclosure, let alone the *particularized* need required by past decisions of this Court.

1. *This Court has consistently held that proceedings before a grand jury are to be kept secret.* The secrecy of grand-jury proceedings is an historically established policy, designed to protect the grand-jury process itself. Such is the consistent view of this Court, stated over two decades in an unbroken series of decisions. *United States* v. *Johnson,* 319 U.S. 503, 513 (1943) ("indispensable secrecy"); *Costello* v. *United States,* 350 U.S. 359, 362 (1956) ("body of laymen . . . acting in secret"); *United States* v. *Procter & Gamble Co.,* 346 U.S. 677 (1958); *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959); *Dennis* v. *United States,* 384 U.S. 855, 869 (1966).

The need to protect grand-jury secrecy does not end with the return of an indictment, the discharge of the grand jury, or the termination of the criminal proceeding. As the Court wrote in *Pittsburgh Plate Glass Co., supra:*

> "The reasons . . . [for 'a long-established policy' of secrecy] are manifold [citing *Procter & Gamble, supra*] and are compelling when viewed in light of the history and *modus operandi* of the grand jury. . . . To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body." 360 U.S. at 399-400.

2. *The Court has permitted only limited breaches of grand-jury secrecy.* The Court has said:

> "This 'indispensable secrecy of grand jury proceedings,' *United States* v. *Johnson, supra,* at 513, must not be broken except where there is a com-

> pelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity." *Procter & Gamble Co., supra,* at 682.

The "burden . . . is on the [party seeking disclosure] to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy." *Pittsburgh Plate Glass Co., supra,* at 400.

One such showing of "particularized need" is, in effect, codified in Rule 16(a)(3) of the Federal Rules of Criminal Procedure, referred to above. That provision recognizes that fairness to the defendant in a criminal case requires disclosure to him of the testimony he has previously given to the body now charging him with guilt. See generally 1966 Advisory Committee Note to Rule 16.

Apart from the area covered in Rule 16, the opportunities to examine grand-jury testimony are rare. They are particularly rare in civil cases, where the Court has granted access to grand-jury transcripts only for use at trial: to impeach, to refresh recollection, or to test credibility. See *Procter & Gamble Co., supra,* at 683; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 234 (1940). The Court has expressly disapproved pretrial disclosure solely for discovery purposes—even when convenient or economical for the party seeking it:

> "The relevancy and usefulness of the testimony sought were, of course, sufficiently established. If the grand jury transcript were made available, discovery through depositions, which might involve delay and substantial costs, would be avoided. Yet these showings fall short of proof that without the transcript a defense would be greatly prejudiced or that without reference to it

an injustice would be done . . . [N]o compelling necessity has been shown for the *wholesale* discovery and production of a grand jury transcript under Rule 34 [of the Federal Rules of Civil Procedure]. We hold that a much more particularized, more discrete showing of need is necessary. . . . The court made no such particularized finding of need in case of any one witness. It ordered that the entire transcript be delivered over to the appellees." *Procter & Gamble Co., supra,* at 682-83 (emphasis in original).[6]

3. *Access to grand-jury proceedings for subsequent civil actions is severely limited.* In limited instances,

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[6] The lower federal courts have uniformly followed this rule. See, *e.g., Continental Baking Co.* v. *United States,* 281 F.2d 137, 148 (6th Cir. 1960) ("The requests on behalf of the defendants were for the entire transcript of the witnesses' testimony before the Grand Jury. Such a demand lacks the selectivity called for under the law and is in excess of the particularized need occasioned by the Government's limited use. This practice has been condemned by the Supreme Court as 'wholesale discovery.'"); *City of Philadelphia* v. *Westinghouse Elec. Corp., supra,* at 490 ("Grand Jury transcript should never be opened solely for discovery purposes. The historical reluctance of the Court to open Grand Jury records would outweigh any other considerations where they are sought purely for discovery purposes"); *Application of State of California to Inspect Grand Jury Subpoenas,* 195 F.Supp. 37 (E.D. Pa. 1961) ("[T]he only reasons for disclosure here are the avoidance of expense and additional work, in order to recoup alleged financial losses in the various civil actions for treble damages. These do not outweigh the policy of secrecy"); *In Re Grand Jury Proceedings,* 29 F.R.D. 151 (E.D. Pa. 1961), *aff'd,* 309 F.2d 440 (3d Cir. 1962) (access to grand-jury testimony by Federal Trade Commission denied); see also *In Re April 1956 Term Grand Jury,* 239 F.2d 263, 271 (7th Cir. 1956), *cert. denied sub nom. Shotwell Mfg. Co.* v. *United States,* 352 U.S. 998 (1957) ("The idea that information obtained from the perusal of material in the possession of a grand jury may be used for the purpose of a civil proceeding is in direct conflict with the policy of secrecy of grand jury proceedings").

federal courts have permitted the disclosure of grand-jury testimony to third parties for use in pretrial discovery in private treble-damage actions. But they have done so only on a witness-by-witness basis, only after depositions have commenced, and only after the party seeking disclosure has shown a "particularized need" based on the actual state of those depositions. The established rule is that inspection of a witness' grand-jury testimony will be permitted solely upon a showing that the witness' deposition testimony reveals significant lapses of memory or material discrepancies between his grand-jury and deposition testimony.

The leading case is *City of Philadelphia* v. *Westinghouse Elec. Corp., supra.* There, Judge Clary held that disclosure of grand-jury testimony could be made only upon a particularized showing of compelling need after an *in camera* examination by the Court. The Court wrote (210 F. Supp. at 489, 491):

> "The Supreme Court has quite clearly stated in *United States* v. *Procter & Gamble Co., supra,* 356 U.S., at 682-683, . . . that the policy of secrecy accorded to Grand Jury Proceedings can only be outweighed by this countervailing policy upon the showing of a particular need, compelling necessity, or that the ends of justice require it. This position was reemphasized in *Pittsburgh Plate Glass Co.* v. *United States, supra. These cases have been equally clear in deciding that relevancy and usefulness of the testimony are not enough to satisfy these standards of necessity and justice. United States* v. *Procter & Gamble Co., supra,* 356 U.S. at 682-83 . . . *Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 400 . . . .
>
> *"If relevancy and usefulness were the only factors of need in plaintiffs' case, this motion would have to be denied."* (Emphasis supplied.)

* * * * * * * * *

> "If, at the completion of any deposition . . ., a motion is made for the production of that witness' Grand Jury testimony, and if the deposition Judge requests it from this Court for examination in camera, the testimony will be immediately made available to him. The deposition Judge may then contrast the Grand Jury testimony with the deposition and determine, in his own discretion, whether in the interest of justice there is compelling need for disclosure."

Judge Clary's procedure has been uniformly adhered to by other federal courts. See, *e.g., Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce,* 323 F. 2d 233 (5th Cir. 1963); *Atlantic City Elec. Co.* v. *A. B. Chance Co.,* 313 F. 2d 431 (2d Cir. 1963), *petn. for stay pending cert. denied,* 83 S. Ct. 964 (1963) (Harlan, Cir. J.); *Consolidated Edison Co.* v. *Allis-Chalmers Mfg. Co.,* 217 F. Supp. 36 (S.D.N.Y. 1963); *Philadelphia Elec. Co.* v. *Anaconda American Brass Co., supra,* at 149.

4 *The private plaintiff is not relieved of his burden of proving "particularized need" simply because the grand-jury transcripts he seeks have previously been disclosed to the defendant.* The petitioners were permitted to inspect the grand-jury testimony of their respective officers and employees in the course of the criminal proceeding against them. They were accorded that right by express provision of the Federal Rules of Criminal Procedure. But that fact does not relieve unrelated private parties from the requirement that they make their own showing of "particularized need" to obtain their own inspection of that testimony. See *Hancock Bros.* v. *Jones,* 293 F. Supp. 1229 (N.D. Calif. 1968).

The holding of the District Court means, in effect, that once the criminal defendant obtains access to his own grand-jury testimony under Rule 16, it auto-

matically becomes available to adversaries in subsequent civil actions—at least where those actions may be protracted. That holding puts a possibly incalculable price tag on the criminal defendant's exercise of the rights granted him under Rule 16; it curtails the effectiveness of those rights and undercuts the policy the Rule seeks to implement; it trenches on the authority of Rule 16(e), as to which the 1966 Advisory Committee has cautioned: "Control of the abuses of discovery [civil as well as criminal] is necessary if [discovery] . . . is to be expanded in the fashion proposed in subdivision (a) . . . ." See *Hancock Bros.* v. *Jones, supra.*

5. *The courts below have effectively abolished the "particularized need" requirement.* In this case the district court purported to apply the "particularized need" requirement to the discovery motion of the private plaintiffs. But it found that requirement satisfied by factors that are bound to be present in virtually every complex antitrust litigation: (1) the lapse of time since the grand-jury testimony, and (2) the petitioners' prior access to the grand-jury transcripts now sought by the private plaintiffs. Neither of those factors should suffice.

Except for the decision below, no court has ever held that the mere lapse of time—"substantial" or otherwise—can establish a "particularized need" for grand-jury transcripts. The requisite need must be shown on a witness-by-witness basis, after depositions have commenced. The party seeking disclosure is required to make a particularized demonstration, based upon the deposition testimony of the witness in question. The *substance* of that testimony—not the time elapsed between its taking and that of the witness's

prior grand-jury testimony—is the sole relevant consideration.

If a mere lapse of time is enough to show "particularized need," there will hardly ever be another case in which the showing cannot be made. Antitrust litigations by the Government, followed by civil actions, are often protracted proceedings. Almost always a considerable time will elapse between grand-jury proceedings and the litigation of subsequent treble-damage actions.

The private plaintiff in treble-damage actions sustains no prejudice by enforcement of the "particularized need" requirement. If he can show, after depositions have commenced and on a witness-by-witness basis, that he needs earlier grand-jury testimony, the cases permit disclosure of that testimony. But the cases do *not* permit the disclosure of grand-jury testimony as a handy pre-deposition discovery device simply because a long time has passed between grand jury and deposition testimony.

Nor can the "particularized need" requirement be satisfied on the simple basis that the petitioners have had access to transcripts of their grand-jury testimony to prepare their defense in the criminal action. Under Rule 16(a)(3), virtually every criminal defendant can—and should—see his own grand jury testimony.

II. THE HOLDING THAT THE PETITIONERS LACKED STANDING BEFORE THE DISTRICT COURT TO CONTEST THE PRIVATE PLAINTIFFS' APPLICATION IS ERRONEOUS AND DEPARTS FROM NUMEROUS DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS

Contrary to the thinking of the court of appeals, the petitioners clearly had standing before the district court to object to the private plaintiffs' application for disclosure, as other federal courts have frequently

held. The petitioners are parties to the action—which is more than the private plaintiffs can say. The testimony in dispute is, effectively, that of the petitioners. Disclosure of that testimony will adversely affect the petitioners, both because the private plaintiffs will seek to use it against them in the private actions and because it will retroactively penalize the petitioners for the exercise of their Rule 16 rights. Finally, there can be no question that the petitioners will vigorously present the issues required for proper resolution of the discovery issue by the federal courts.

1. *The petitioners are adversely affected by the order of disclosure.* The petitioners have a privilege, recognized in law, to avoid the disclosure not only of their own testimony, but of *all* testimony before the grand jury concerning them. *Doe* v. *Rosenberry,* 255 F.2d 118, 119 (2d Cir. 1958) (L. Hand, J.). That privilege reflects the petitioners' practical interest in avoiding indiscriminate disclosure of their grand-jury testimony. The private plaintiffs are interested in gaining whatever advantage they may obtain, both in discovery and at trial; the petitioners are directly and immediately affected by the private plaintiffs' efforts in that direction.

Moreover, the private plaintiffs seek to draw upon material that the grand jury has obtained by unique procedures, not subject to cross-examination or evidentiary safeguards, and for a specific, limited purpose—the lodging of criminal charges. The use of that material in a civil proceeding poses an immediate risk of unfairness to the civil defendants. Civil discovery is otherwise bounded by carefully refined rules, developed to protect both sides in the litigation. But opening up the grand jury investigation as an adjunct

to the plaintiffs' discovery threatens to overturn the balance struck by the civil rules.

At this juncture, the parties most directly affected by any proposed disclosure are those subjected to the inquisition that is sought to be exposed—the petitioners here. Whatever the proper disposition of the discovery controversies on the merits, there can be no doubt of the petitioners' interest in having an opportunity to be heard before those controversies are judicially resolved.

Under recent decisions of this Court, that interest, without more, satisfies the "standing" requirements both of the Constitution and of the pertinent Federal Rules of Criminal Procedure. As the Court said in *Sierra Club* v. *Morton,* — U.S. —, 40 U.S.L.W. 4397 (Apr. 19, 1972), the question is whether the party "is himself adversely affected . . . ." *Id.* at —, 40 U.S.L.W. at 4399. That adverse effect arises from "injury in fact, economic or otherwise," *Ass'n of Data Processing Organizations, Inc.* v. *Camp,* 397 U.S. 150, 152 (1970)—injury that is undeniably threatened here. Once that injury is perceived, the sole remaining question, so far as standing is concerned, is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected *or regulated* by the statute or constitutional guarantee in question." *Id.* at 153 (emphasis supplied). The "statutes" here at issue—Rules 6 and 16 of the Federal Rules of Criminal Procedure—clearly regulate the scope of grand-jury disclosure.

2. *The decision below departs from the settled course of precedent in the lower federal courts.* The courts have routinely accorded "standing" to the civil defendant to challenge the disclosure of his grand-jury

testimony to private parties. The courts have done so where the defendant as a party in the civil action is confronted with a motion to obtain grand-jury testimony of which he has a record, *City of Philadelphia* v. *Westinghouse Elec. Corp., supra,* at 487, or of which he has obtained a summary prepared by his attorneys, *Philadelphia Elec. Co.* v. *Anaconda American Brass Co., supra,* at 147. The result does not differ where the defendant in the civil case has never seen his grand-jury testimony, and the plaintiff seeks its production from the third-party custodian in the course of his civil action. *E.g., Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce, supra* (district court sitting as special master in electrical antitrust cases held grand-jury testimony pursuant to order in *City of Philadelphia* v. *Westinghouse Elec. Corp., supra*); *Atlantic City Elec. Co.* v. *A. B. Chance Co., supra* (same; appeal and mandamus with respect to order directing disclosure denied as interlocutory and for want of abuse of discretion by special master); *Consolidated Edison Co.* v. *Allis-Chalmers Mfg. Co., supra.*

The defendant still has standing where the private plaintiff somehow manages to present his demand for the grand-jury testimony in a forum other than his own civil case. Thus, in *In re Grand Jury Proceedings,* 29 F.R.D. 151 (E.D. Pa. 1961), the Federal Trade Commission moved in a miscellaneous proceeding for an order to permit inspection and copying of grand-jury testimony. The court denied the motion. And the defendants—who were not even parties in the miscellaneous matter—"appeared, argued and filed briefs in opposition to the petition, both on behalf of the corporations and their respective employees. . . ." *Id.* at 152-53. A similar result obtained in *Application of State of California to Inspect Grand Jury Subpoenas,*

195 F.Supp. 37 (E.D. Pa.), where the State sought leave—unsuccessfully—to inspect and copy grand-jury transcripts by a motion filed in a miscellaneous proceeding. Indeed, in *In re Bullock,* 103 F.Supp. 639 (D.D.C. 1952), in response to efforts of the District Commissioners to obtain access to grand-jury minutes of an investigation of a police inspector, the respondent was first afforded an opportunity to give his voluntary consent and then failing that to file an answer to the petition and to be heard in opposition thereto —with respect not to his own testimony, but to the grand-jury proceeding as a whole.[7]

The defendant's standing does not suddenly disappear when the private plaintiff interjects his demand for grand-jury testimony in the civil proceeding brought by the Government rather than in his own action. Thus, in *United States* v. *General Elec. Co.,* 209 F.Supp. 197 (E.D. Pa. 1962), where the Government instituted damage actions following a grand-jury investigation, the defendants were permitted as a matter of course—and successfully—to oppose the effort

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[7] In *United States* v. *Interstate Dress Carriers, Inc.,* 280 F.2d 52 (2d Cir. 1960), the Government sought leave of the district court to turn over the trucking company's documents subpoenaed by the grand jury to the Interstate Commerce Commission, which sought them for its own investigation and had independent authority to get them from the company. The company opposed the application before the district court and prosecuted an appeal from that court's disclosure order. The court of appeals affirmed the order—and confirmed the appellant's standing—by noting that "[d]ocuments produced pursuant to a grand jury subpoena remain the property of the person producing them, . . . and their inspection by persons other than the grand jury and the prosecuting attorneys is therefore dependent on the consent of the owner or upon a Court order." 280 F.2d at 54. For standing purposes, the "proprietary" justification advanced by the court of appeals should not obscure the functional identity of documents and oral testimony. See *In re Petroleum Industry Investigation,* 152 F. Supp. 646 (E.D. Va. 1957).

of the Tennessee Valley Authority to secure access to the grand-jury minutes. *Id.* at 202.

In this very case, the district court—which correctly raised no question of the petitioners' standing to oppose the private plaintiffs' application—recognized the principle at stake. It provided, in another portion of its order, that with respect to the private plaintiffs' requests to examine documents obtained by the Government in its criminal proceeding from third persons other than the defendants, those persons should be given notice of the requests and an opportunity to object to disclosure by written notice and motion filed with the court (App. B, ¶ 2).[8]

The logic supporting the unquestioned recognition of standing in these diverse situations is clear. No matter what the procedural context, "in the case of an attempted disclosure of grand jury testimony, the interests at stake are not only *those of the parties,* or of the custodian, *or of the grand jury witness who is called upon to testify,* but also of the general public. . . ." *Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce, supra,* at 243 (Cameron, J., dissenting) (emphasis supplied).[9] As Judge Weinfeld has written in an analo-

[8] The district court's order in this regard parallels settled administrative policy as approved by the lower federal courts. For example, in *In re Four Seasons Securities Laws Litigation,* 54 F.R.D. 527, 530-31 (W.D. Okla. 1972), Judge Thomsen, sitting by designation, followed the regulatory procedure of the Securities and Exchange Commission that when discovery is sought in civil litigation of transcripts of testimony in a Commission investigation, the person who gave the testimony should be heard by the court if he opposes discovery.

[9] This Court traditionally declines to reject consideration of the merits of questions of major public importance where the impact of the challenged order on the party before it is neither remote nor speculative. There is no question that the petitioners can ably and fully present the issues here raised for the Court's plenary consideration. See *Flast* v. *Cohen,* 392 U.S. 83, 99 (1968); *Baker* v. *Carr,* 369 U.S. 186, 204 (1962).

gous context, "Under the circumstances it is clear that [the petitioners] . . . have an important stake in the present application and are directly concerned with its outcome." *In re United States Electrical Radio & Machine Workers of America,* 111 F.Supp. 858, 862 (S.D. N.Y. 1953) (unions and officers petitioned to suppress grand-jury "presentment").[10]

3. *If anyone lacks standing in this proceeding, it is the private plaintiffs.* The private plaintiffs have never been made parties to the proceeding, either in the district court, the court below, or—so far—in this Court. The district court conferred on them only the status of *"amici,"* and the court of appeals in its *per curiam* opinion pointedly referred to them as "appellees"—in quotation marks. The private plaintiffs have never explained their failure to pursue the remedies properly afforded them by the Federal Rules of Civil Procedure in their own private actions. And no court has explained the basis—if any—upon which grand-jury testimony may be directed to be disclosed to persons not even parties to the proceeding before the court.

[10] Apart from the "standing" issue "in the strict legal sense," the federal court has special supervisory responsibilities with respect to the grand jury. The court may properly consider grand-jury matters by "choos[ing] to hear those who have raised . . . questions because they have shown that . . . alleged violations have injured them"; it is the court's "responsibility, since the matter has finally come to [it] . . . ." *In re United Electrical Radio & Machine Workers of America, supra.*

CONCLUSION

For the foregoing reasons, the petitioners pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

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